Supreme Court, U.S.
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No. 07-1416

In the
# Supreme Court of the United States

BRUCE M. SKOORKA,

*Petitioner,*

– v. –

KEAN UNIVERSITY, THE STATE OF NEW JERSEY, THE BOARD OF TRUSTEES OF KEAN UNIVERSITY, WILLIAM M. KEMPEY, officially and individually, RONALD L. APPLBAUM, as President of Kean University and individually, FRANK J. ESPOSITO, as Interim President of Kean University and individually, KEAN FEDERATION OF TEACHERS, and COUNCIL OF NEW JERSEY STATE COLLEGE LOCALS,

*Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

## PETITION FOR REHEARING

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## GROUNDS FOR PETITION FOR REHEARING

Bruce M. Skoorka ("Plaintiff" or "Petitioner" or "Dr. Skoorka") respectfully petitions for a rehearing of the denial of his Petition for a Writ of Certiorari filed on May 12, 2008 (No. 07-1416), and requests that a writ of certiorari be issued to review the decision of the Supreme Court of New Jersey, entered on February 14, 2008 which denied a petition for certification of a judgment of the Appellate Division of New Jersey dated August 30, 2007.

On or about May 12, 2008, Plaintiff filed a petition for a writ of certiorari ("Petition") seeking relief under the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, which provides, in relevant part, "nor shall any State deprive any person of life, liberty or property without due process of law." The Petition addressed the following issue: "Whether a judgment based on a voluntary dismissal with prejudice should be regarded as appealable where, as here, Petitioner's solicitation of the dismissal was expressly designed for the stated purpose of expediting review of numerous orders which had eviscerated all of Petitioner's claims." On October 6, 2008, this Court denied the Petition.

This Court should grant a rehearing because there are "intervening circumstances of a substantial or controlling effect or ... other substantial grounds not previously presented." U.S.S.C. Rule 44. Specifically, at the end of May 2008 and early June 2008, after the Petition was filed, the State Defendants suddenly produced numerous documents that go to the heart of Plaintiff's case, which documents were

intentionally withheld by the State Defendants[1] for several years — even after the Trial Court ordered that they be produced in 2004. In 2005 Plaintiff was forced to take a voluntary dismissal with prejudice in order to appeal, because, *inter alia*, he had been deprived of discovery necessary to proceed to trial. That discovery included the documents crucial to Plaintiff's claims that State Respondents suddenly produced at the end of May 2008 and early June 2008, three years after the voluntary dismissal with prejudice.

This intervening circumstance illustrates vividly and forcefully the reasons why one must sometimes take a voluntary dismissal with prejudice — because the litigant has been illegally backed into a corner where there is no other choice. Had Petitioner obtained these materials on time, he wouldn't have had to take a voluntary dismissal with prejudice in order to appeal. This intervening circumstance of a substantial effect warrants this Court taking a second look at the issue presented by the Petition.

## ARGUMENT

### A. Background

Dr. Bruce M. Skoorka, a professor at Kean University ("Kean") and a member of the Kean Federation of Teachers ("KFT" or the "Union"), filed a lawsuit against Kean, The State of New Jersey, the Board Of Trustees Of Kean, William M. Kempey, Ronald L. Applbaum and Frank J. Esposito ("State

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[1] "State Defendants" or "State Respondents" — all defendants in the case except two unions, the Kean Federation of Teachers and the Council of New Jersey State College Locals.

Respondents"), KFT and Council Of New Jersey State College Locals ("Union Respondents"), to remedy unlawful discrimination, harassment and retaliation. Petitioner alleged nine counts under the New Jersey Conscientious Employee Protection Act, N.J.S.A. 34:19-1 *et seq.* ("CEPA"), the New Jersey Law Against Discrimination, N.J.S.A. §§ 10:5-1 *et seq.* ("NJLAD"), the New Jersey Constitution and the United States Constitution. Several of Petitioner's claims involved allegations of criminal conduct yet were dismissed by the Trial Court on motions for summary judgment.

Dr. Skoorka is a highly qualified professor who joined Kean to teach, conduct research and work in a lawful and professional academic environment. He was appalled by unlawful and unethical religious and race discrimination, financial and political corruption, and violations of policy and procedure involving among others his Department Chairperson, Dr. Kempey. Dr. Skoorka reported the unlawful and unethical conduct, expecting Kean and the Union to remedy it. Instead, Respondents viciously retaliated against Dr. Skoorka on an ongoing and escalating basis since 1998, harassed him, and unlawfully denied him a promotion. There is voluminous documentation, deposition testimony and other corroborating evidence establishing Petitioner's complaints and Respondents' unlawful conduct.

The Trial Court at first denied Petitioner relevant and material document discovery and depositions and granted State Respondents' three motions for summary judgment (in 2004 and 2005), eviscerating virtually all of Petitioner's claims and dismissing virtually all defendants. On October 17 and 18, 2005,

Petitioner was forced to attend a futile trial and, when the Trial Court further eviscerated his remaining claims, Petitioner had no chance of recovery and was forced to take a voluntary dismissal with prejudice to take a global appeal, including an appeal on the central issue of discrimination/retaliation in the denial of promotion. Petitioner clearly stated on the record that he was taking the dismissal for the express purpose of pursuing a global appeal. (A-65 to A-68.)[2]

Petitioner made it clear to the Trial Court that he was expressly reserving his rights to seek a global appeal, i.e., an appeal of all erroneous rulings that had compelled him to take the dismissal. Petitioner stated: "It's my understanding I believe that the case will be futile on the judge's prior rulings and the rulings yesterday and today and I understand the ramifications and I reserve my appeal rights." (A-65.) Petitioner's counsel repeatedly stated that the voluntary dismissal was "with prejudice," leaving no doubt that it was being entered for the purpose of taking a global appeal. (A-67 to A-68.)

Petitioner then filed an appeal, seeking reversal of the Trial Court's Orders. On August 30, 2007, the Appellate Division by Order (A-3 to A-61) granted in part and denied in part the appeal. Most importantly for present purposes, the appellate court erroneously held that Petitioner could not reinstate his claims that had been dismissed at the time of trial to expedite his global appeal.

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[2] Numbers preceded by "A" refer to pages of the Appendix to the Petition for a Writ of Certiorari.

This ruling deprived Petitioner of Due Process of Law. It is at odds with the decisions of several other States, as well as several federal courts, that permit voluntary dismissals to enable timely and effective appellate review, and created a substantial injustice. As set forth in the Petition, the claims covered by Petitioner's voluntary dismissal are appealable and can be reinstated. A judgment based on voluntary dismissal is regarded as involuntary and appealable where, as here, the plaintiff's solicitation of the dismissal was designed to expedite review of an order which had in effect dismissed plaintiff's claims. This Court and numerous lower federal courts have so held. *U.S. v. Procter & Gamble Co.*, 356 U.S. 677, 680-681 (1958); *John's Insulation, Inc. v. L. Addison & Assocs., Inc.*, 156 F.3d 101, 107 (1st Cir. 1998); *Empire Trevino-Barton v. Pittsburgh Nat'l Bank*, 919 F.2d 874, 878 (3d Cir. 1990); *Empire Volkswagen Inc. v. Worldwide Volkswagen Corp.*, 814 F.2d 90, 94 (2d Cir. 1987); *Bogorad v. Eli Lilly Co.*, 768 F.2d 93 (6th Cir. 1985); *Raceway Properties, Inc. v. Emprise Corp.*, 613 F.2d 656, 657 (6th Cir. 1980). So have numerous State courts. (*See* Petition at 6).

## B. The Intervening Circumstances of a Substantial Effect.

At the end of May 2008 and early June 2008 — after the initial petition was filed on May 12, 2008 — State Respondents suddenly produced documents that go to the heart of Plaintiff's claims regarding unlawful denial of promotion: detailed applications for promotion (and related promotion materials) for 21 faculty members promoted ahead of Plaintiff. These documents are crucial to Plaintiff's claims that he was unlawfully denied a promotion and should have been produced by State Defendants several

years ago in response to Plaintiff's discovery requests and the Trial Court's discovery orders. From approximately 2003 through 2008, State Defendants falsely stated that they do not retain faculty promotion application materials and intentionally withheld these crucial promotion application materials from Plaintiff. In doing so, State Defendants violated both their discovery obligations and the Trial Court's orders relating to discovery.

Briefly, Petitioner first requested these documents in 2002. State Defendants agreed to produce them in open Court on March 21, 2003, but subsequently failed and refused to do so, falsely alleging that they did not have the documents. In May 2004, the Trial Court expressly ordered State Defendants to produce them. State Defendants then provided only incomplete materials, again falsely stating that they lacked complete records. State Defendants falsely represented that they lacked the documents to Plaintiff and the Trial Court. In 2006, Ronald Applbaum, Kean's President and the key decision maker on these (and Petitioner's) promotion applications, died. In late May 2008, State Defendants suddenly produced detailed applications for promotion (and related promotion materials) for the 21 faculty members promoted ahead of Plaintiff. These documents were contained in faculty personnel files that State Defendants suddenly produced. This confirmed that State Defendants had these crucial documents and records all along, yet misrepresented that they did not have them and intentionally withheld them from Plaintiff for years, even after the Trial Court ordered their production.

State Defendants' willful, deliberate and contumacious noncompliance with the Trial Court's May 2004 Order and violation of discovery obligations materially impaired Petitioner's ability to present his case. The lack of these documents was one of the primary reasons Petitioner took a voluntary dismissal in October 2005, because he was unable to proceed to trial without such crucial documents that State Defendants were unlawfully withholding while State Defendants simultaneously falsely stated that they lacked such documents.

Had State Defendants complied with the Trial Court's May 2004 Order and admonitions, and timely produced the promotion application materials, Petitioner would have obtained crucial evidence directly supporting his claims of unlawful denial of promotion and completely undermining State Defendants' defenses. The withheld files contained numerous documents that demonstrate that Petitioner was more qualified than these faculty members for promotion. The withheld files also demonstrate that some of the faculty members were not qualified to be hired, let alone retained, tenured and promoted.

Indeed, had State Defendants timely produced the files, Petitioner would have had the documents prior to the numerous depositions (at least 17 in number) that were conducted. Petitioner would have been able to fully develop the record and establish conclusively that Petitioner was more qualified than the 21 faculty members that were promoted ahead of him. Petitioner would have been able to depose Ronald Applbaum — Kean's President and primary decision maker on the promotions — using the

promotion application materials for all 21 faculty members. Petitioner can no longer conduct complete discovery regarding these records because Applbaum died in 2006 and, therefore, cannot be deposed about these newly-produced promotion application materials. Petitioner would have been able to proceed to trial in October 2005 on his then remaining claims relating to denial of promotion (although the Trial Court had erroneously dismissed certain other claims). Petitioner was forced to make litigation decisions based upon the lack of these documents — including taking the voluntary dismissal with prejudice in October 2005.

Petitioner will shortly be filing a motion in the Trial Court seeking, among other items, sanctions, reinstatement of dismissed claims and certain individual defendants, the striking of the State Defendants' Answer on at least Petitioner's claims relating to denial of promotion, entry of a default judgment against State Defendants, and attorneys' fees and costs. There is ample authority under New Jersey law for the granting of such relief. *See Lang v. Morgan's Home Equipment Corp.*, 6 N.J. 333, 339 (1951) (Vanderbilt, C.J.); *Merck & Co. v. Biorganic Laboratories, Inc.*, 82 N.J.Super. 86, 88, 91, 196 A.2d 688 (App.Div. 1964); *Interchemical Corporation v. UNCAS Printing and Finishing Co.*, 39 N.J. Super 318, 120 A.2d 880 (App. Div. 1956).

However, there is no guarantee that such relief will be granted in this case, despite overwhelming evidence that the State Defendants withheld crucial discovery deliberately and contumaciously. That is why Petitioner seeks rehearing from the denial of certiorari by this Court. The events since the filing

of the Petition demonstrate why Petitioner had to take the voluntary dismissal with prejudice to mount a global appeal — because he had been illegally backed into a corner where that was his only choice. This intervening circumstance of a substantial effect warrants this Court considering rehearing of the issue presented by the Petition.

## CONCLUSION

The Court should grant this petition for rehearing and issue a Writ of Certiorari to review the decision of the NJ Supreme Court entered on February 14, 2008 which denied a petition for certification of a judgment of the Appellate Division dated August 30, 2007.

Dated: October 30, 2008

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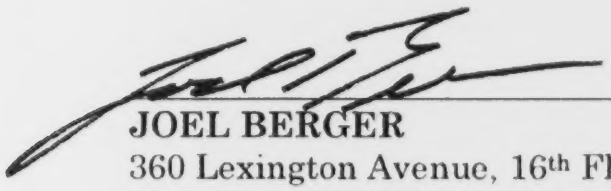
## CERTIFICATE OF GOOD FAITH

**JOEL BERGER,** an attorney duly admitted on January 10, 1972, to practice before the Supreme Court of the United States, hereby certifies pursuant to Rule 44 of the Supreme Court of the United States that the within Petition for Rehearing of the denial of Petitioner's Petition for a Writ of Certiorari is restricted to the grounds specified in Rule 44, *i.e.*, it is "limited to intervening circumstances of a substantial or controlling effect or other substantial grounds not previously presented," and that it is presented in good faith and not for delay.

Respectfully submitted,



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